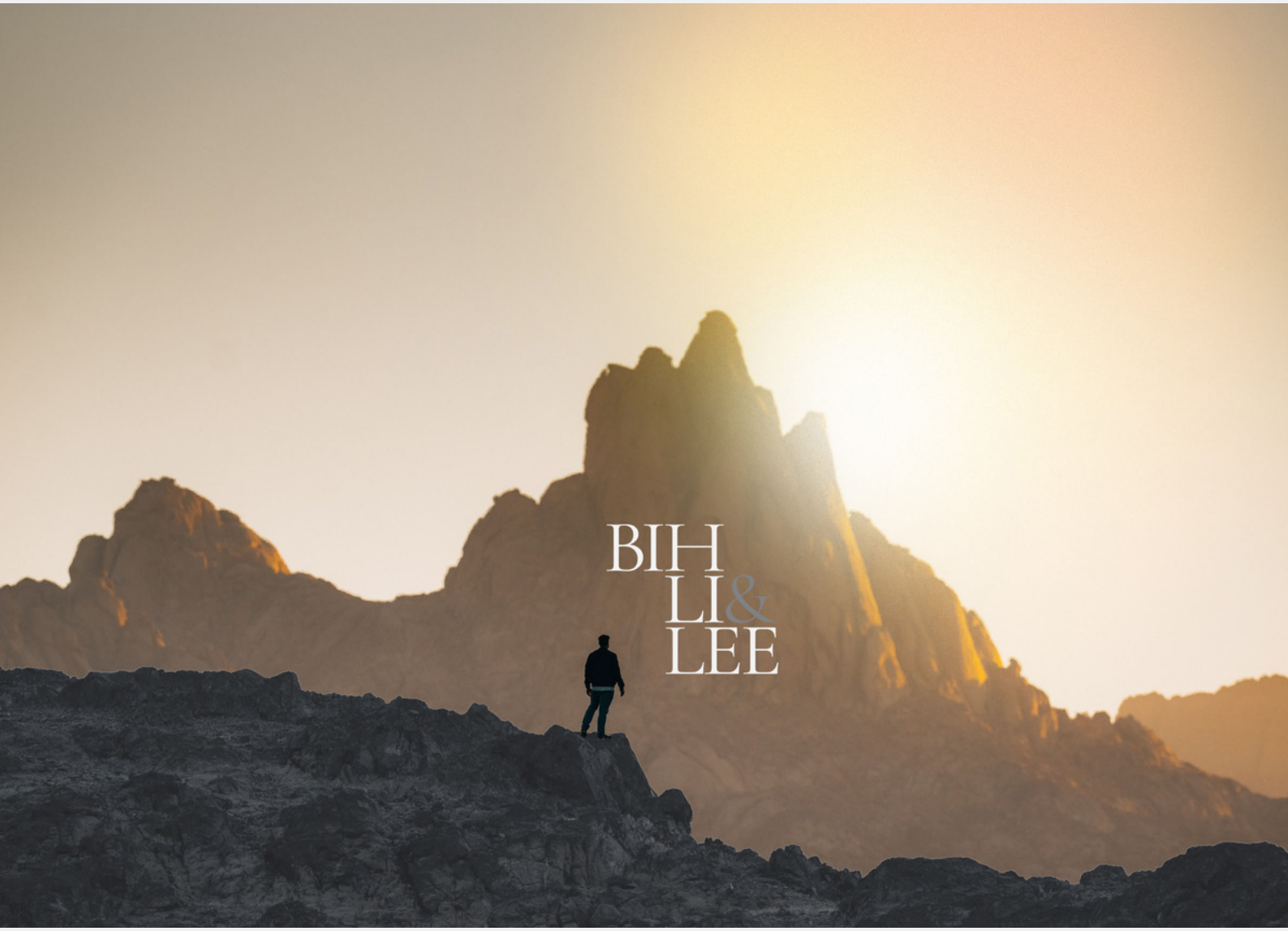

LEGAL UPDATES

Insolvency & Restructuring / March 2024

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Case Update: Re Fusionex Pte Ltd (Resorts World At Sentosa Pte Ltd, Nonparty) [2024] SGHC 51

The recent decision of Re Fusionex Pte Ltd (Resorts World at Sentosa Pte Ltd, non-party) [2024] SGHC 51 ("Re Fusionex") is the first reported case of a winding up ordered by the courts based on a special resolution.

The High Court in its judgment published on 27 February 2024 had noted that section 125(1)(a) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") is "rarely invoked as a ground for winding up, and there are no reported cases in Singapore of a winding up being allowed on this ground".After considering persuasive Australian authorities, the High Court allowed the winding up application.

Background

The company, Fusionex Pte. Ltd. (the "Company") was incorporated in Singapore and wholly owned by Fusionex Corp. Sdn. Bhd., a company incorporated in Malaysia ("Sole Shareholder"). Both the Company and the Sole Shareholder were part of the Fusionex group of companies (the "Group"). The Company and the Sole Shareholder were indirectly owned by FusioTech Holdings Sdn. Bhd. (the "Holding Company"), the latter also being a part of the Group.

In early December 2023, the entire management team of the Group left their roles abruptly without effecting a proper handover. As the Company had relied on the Group and the ultimate holding company for finance, accounting and IT matters, there was sparse information on the Company's affairs. Further, it appeared that the sole director of the Company was not an executive director and lacked knowledge on the Company's affairs.

On 20 December 2023, the Sole Shareholder passed a special resolution for the Company to be wound up by the courts.The submission on behalf of the Company was that the winding up was that it was not possible to take the route of a members' voluntary winding up because there was insufficient information for the director to make a declaration of solvency. A creditors' meeting could not be convened as the current management also had little or no information on the Company's list of creditors.

As the director of the Company was not an executive director and did not have knowledge of the affairs of the Company, the Court accepted the supporting affidavit of the CEO of the Holding Company.

Winding Up by Special Resolution

The High Court noted that the Australian courts have generally ordered a winding up where the procedural requirements (such as the validity of the special resolution) have been satisfied, and there is limited discretion to withhold a grant of a winding up application in such a case. It was held that:

(a) It is not for the court to question the decision by the shareholder(s) to pursue a compulsory winding up by the court over a voluntary winding up. Where a special resolution has been validly passed for the winding up of the company by the court, then the winding up application should generally be allowed subject

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to two considerations, being that of (i) the interests of the creditors and (ii) the presence of bad faith or other untoward circumstances.

(b) With respect to first consideration (i.e. the interests of the creditors), the court may consider if there is any explicit objection, the list and scope of the creditors (if this is available), and whether the winding up would put the creditors in a more detrimental position.

(c) With respect to the second consideration (i.e. presence of bad faith or untoward circumstances), a company seeking to be wound up should be transparent and explain the circumstances which would justify the court's exercise of its discretion. The High Court added that while lack of transparency on its own should not be fatal to the application, a proper explanation will help to dispel any concerns of untoward circumstances.

The High Court allowed the winding up of the Company on the grounds of section 125(1)(a) of the IRDA, holding that it was desirable to order a winding up due to circumstances making it such that the current management was not able to conduct the Company's affairs properly. Further, there was no objections from any creditors, and no suggestion of any "unconscionable or inequitable circumstances" which would call for the court to refuse to exercise its discretion in favour of the Claimant.

Commentary

- The decision of Re Fusionex is instructive for winding up applications premised on the ground of section 125(1)(a) of the IRDA. As the High Court had observed in the case, it is more usual that companies would pursue voluntary winding up where a special resolution is passed for liquidation.
- It is only in exceptional circumstances that a company would be forced to involve the courts. Two of such circumstances would be where the management did not have sufficient information to conduct the company's affairs properly, and where the management has left such that the shareholders are left without directors to manage the company.
- In both cases, it would not be possible to pass a special resolution which would fulfil the requirements for members' voluntary winding up as this route requires the directors to provide a declaration of solvency prior to calling the meeting.
- Directors should be cautious about proceeding with members' voluntary winding up if there is lack of information on the company's affairs, in particular given the prescribed offence in the IRDA for making a declaration of solvency without having reasonable grounds for the opinion that the company will be able to pay its debts in full within the period stated in the declaration.
- It would also not be possible to opt for creditors' voluntary winding up since there would not be sufficient information on the creditors and/or the shareholders (left without a functioning management) would not be able to put into place the mechanisms necessary.
- When facing issues in administration, companies considering voluntary winding up should carefully consider whether its financial and management accounts and operating records are sufficient to form the basis to proceed with voluntary winding up or whether the court's intervention is necessary.

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For more information, or should you have any queries or require assistance, please feel free to contact our Darrell Low at dlow@bihlilee.com.sg, Aileen Chua at achua@bihlilee.com.sg or your usual contact at our firm.

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